Supreme Court, U.S.
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No. 96-871

In the

Supreme Court of the United States

October Term, 1996

STATE OIL COMPANY,

Petitioner,

v.

BARKAT U KHAN, and KHAN & ASSOCIATES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE MINNESOTA SERVICE STATION AND CONVENIENCE STORE ASSOCIATION; SOUTH CAROLINA SERVICE STATION DEALERS ASSOCIATION; PETROLEUM RETAILERS AND AUTO REPAIR ASSOCIATION; SERVICE STATION DEALERS OF ARIZONA; NORTH CAROLINA SERVICE STATION ASSOCIATION; WEST VIRGINIA GAS DEALERS & AUTO REPAIR ASSOCIATION; IOWA RETAIL GASOLINE & AUTOMOTIVE TRADES ASSOCIATION; SERVICE STATION DEALERS ASSOCIATION OF MICHIGAN; NESSARA (NEW ENGLAND SERVICE STATION AND AUTOMOTIVE REPAIR ASSOCIATION); NEW YORK STATE ASSOCIATION OF SERVICE STATIONS & REPAIR SHOPS, INC.; AND WISCONSIN AUTOMOTIVE TRADES ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court should overturn the rule established in Albrecht v. Herald Co., 390 U.S. 145 (1968), which held that vertical maximum price fixing is a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

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INTEREST OF AMICI CURIAE

The Amici Curiae,[1] non-profit trade associations, represent the interests of retail gasoline dealers in 14 states: Arizona, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, Vermont, West Virginia and Wisconsin. The consent of the parties to the filing of this brief has been received, and has been submitted to the Court.

These trade associations represent over 4500 dealers in the various states. The total number of gasoline retail outlets declined from 207,416 outlets in 1993 to 190,246 in 1996 as "stringent environmental regulations. . . wiped out thousands of marginal, low-volume units." Market Facts, 88 Nat'l Petroleum News, mid-July, 1996, at 120. Nationwide, there were 34,939 retail gasoline dealers of the top 25 oil companies in 1993, and those oil companies directly operated an additional 9225 stations. Performance Profiles of Major Energy Producers 1993, Energy Info. Admin., Dept. of Energy, DOE/EIA - 0206(93) 35 (1995). Retail dealers operate both traditional service station and convenience store outlets, which are the most common gasoline station types.

The membership of the Amici include a category of dealers that fits precisely the Respondents' profile. Retail gasoline dealers have two major sources of supply. Dealers are supplied either directly by refiners under the refiner's trademark or by a wholesaler or jobber, usually pursuant to a refiner's trademark. See, Market Facts, supra, at 35-43.

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[1] Pursuant to Sup. Ct. R. 37.6 of this Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, their members and its counsel have made monetary contribution to the preparation or submission of this brief.

The question on which this court has granted certiorari- whether supplier-dealer agreements limiting the dealer's maximum resale price are per se violations of the Sherman Act - is of vital importance to the continued independence and, in many cases, the viability of retail gasoline dealers.

This case demonstrates why the per se rule retains vitality, particularly for franchisees and other retailers in exclusive supply arrangements. Not only is the key indicia of a dealer's independence as a business person undermined by vertical pricing arrangements, which interfere with the ability of the market to establish the competitive price, but here a maximum pricing scheme also established a minimum price.

An explanation of gasoline retail marketing and franchising generally may be useful to this Court in considering these issues.

SUMMARY OF ARGUMENT

This Court has acted to protect the independence of retail gasoline dealers from the "evil of . . . retail price maintenance" even when "the complainant may be only one merchant." Simpson v. Union Oil Co., 377 U.S. 16, 21 (1964).

> The fact that, on failure to renew a lease, another dealer takes Simpson's place and renders the same service to the public is no more an answer here than it was in Poller v. Columbia Broadcasting System, 368 U.S. 464, 473. For Congress, not the oil distributor, is the arbiter of the public interest; and Congress has closely patrolled price fixing whether

> effected through resale price maintenance agreements or otherwise.

Id. at 17 (footnote omitted).

Since at least 1911, this Court has repeatedly held that a dealer's right to determine his own resale price is too sensitive and too important to the competitive process to be subject to interference by his supplier. As stated by this Court in Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724 (1988), "vertical agreements on resale prices have been illegal per se since Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)." See also, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951); United States v. Parke Davis & Co., 392 U.S. 29, 47 (1960); Simpson v. Union Oil Co., 377 U.S. 13, 18 (1964); Albrecht v. Harold Co., 390 U.S. 145 (1968); and Catalano, Inc. v. Target Sales, 446 U.S. 643 (1980).

There is no compelling reason for this Court to depart from the well established and much relied upon precedent that vertical price fixing agreements which set minimum or maximum resale prices are per se violations of Sec. 1 of the Sherman Act, (15 U.S.C. § 1). Vertical price fixing interferes with the ability of a retailer to respond competitively to his market, determine his profitable pricing strategy, and make pricing decisions in accordance with the dictates of the retail market forces.

Abandonment of the per se rule against maximum vertical price fixing will prove too alluring to suppliers. They will use their coercive power over existing franchisees and dealers, especially those who are constrained by exclusive dealing arrangements, to usurp the dealer's profit margin, and ultimately his investment in the retail business. The end result of changing the per se rule against vertical price fixing

will be distortions in both the wholesale and retail markets, as suppliers, insulating themselves from direct market forces, squeeze dealer margins by establishing maximum prices while raising dealer costs. With imperfect market knowledge, pricing decisions at retail by wholesale suppliers will be erroneous. However, rather than being punished by the market place for setting the retail price too low in relation to the cost of goods, the suppliers will be rewarded by the capture of the retailer's profit margin and eventually by the return of the franchise, itself, complete with the dealer's goodwill and invested capital.

Virtually all criticism of Albrecht stems from the hypothesis that a competitive benefit will flow from maximum resale price fixing if the retail dealer enjoys a monopoly. That scenario, however, almost never occurs. Retailing is by far the most atomistic and competitive level of production. Given that reality, there is no need to reverse Albrecht. The hypothetical fear of dealer market power, at most, would justify the recognition of an affirmative defense to the per se rule against maximum vertical price fixing. Thus, if a supplier could demonstrate that his dealer possesses retail monopoly power he could justify a maximum resale price. That situation, of course, is not even arguably involved in the current case.

Moving from a per se rule to a rule of reason for maximum resale price maintenance will dramatically impact retailers without sufficient bargaining or economic power to resist the demands of the supplier. Maximum resale prices will be imposed only by the most powerful suppliers on the least powerful retailers. This would not achieve a competitive price. Those retailers are already obligated to charge no more than the competitive price by the structure of the retail market. Instead, the supplier would be able to force the retail

price below the competitive level. This would result in more of the product being demanded than would occur in a competitive market and a concomitant misallocation of economic resources. The competitive market requires not the lowest price, but rather the price which results from the unfettered forces of supply and demand.

Given the long and unambiguous history of the per se rule against all forms of vertical price fixing, and the billions of dollars invested by franchisees in reliance upon their pricing independence, this Court should not depart from the doctrine of stare decisis and should affirm its holding in Albrecht.

ARGUMENT

I. OVERRULING ALBRECHT WILL UNDERMINE THE INVESTMENT OF BILLIONS OF DOLLARS BY FRANCHISEES

The franchising industry, which now accounts for more than one-third of all dollars spent on retail transactions,[2] was built on retailer pricing independence. Albrecht was decided in 1968. From 1970 to 1992 the number of franchised business locations grew from 396,000 to 558,000 locations. Annual franchise sales exploded from 120 billion dollars to 803 billion dollars during the same time period.[3] In order to achieve this growth franchisees invested billions of dollars of

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[2] Warren S. Grimes, When Do Franchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism, 65 Antitrust L.J., Fall 1996, 105.

[3] Franchising in The Economy, U.S. Dep't. of Com., Int'l Franchise Ass'n, Washington, D.C., 1992, cited in John Case, The Wonderland Economy, Inc. Magazine, May 1995, 14, 19.

sunk capital in their franchises.[4] Respondent Khan's investment in his retail business is fairly typical. Khan's investment included a Seventy-Five Thousand Dollar ($75,000.00) origination fee to State Oil, a Twenty-Five Thousand Dollar ($25,000.00) going concern fee, and an expenditure in excess of One Hundred and Five Thousand Dollars ($105,000.00) for capital, equipment, prepaid rent and security deposit. The vast majority of these expenses are sunk costs which cannot be recaptured if Khan leaves the business.

Franchisees make investments in reliance upon the franchisor's marketing expertise, the value of its trademark and the quality of its business system. The franchisor's promotional advantages[5] induces franchisee to invest in the franchise. But all franchisees to date have done so with the knowledge and in reliance on the fact that they could set their own prices and adjust those prices - up or down - to reflect changes in their costs.

Khan, of course, was a relatively new entrant into franchising. Substantial numbers of franchisees, however, have on- going long term relationships with their franchisors. Those relationships are periodically renewed by the execution of new franchise agreements. The petroleum industry is particularly illustrative of this phenomenon. In 1978, Congress passed the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801-2806. ("PMPA") explicitly to protect franchisees from arbitrary and discriminatory terminations or non-renewals. Under the PMPA, the franchise relationship is

[4] Grimes, supra, 106; How Much Does It Cost? Breakdown by Total Investment, Success Magazine, Nov. 1994, 84-5 lists investments in the Ernest & Young Ranking of the top 100 franchises by 4 categories: under $75,000 (31 franchises); $75,001 to $150,000 (34 franchises); $150,001 to $250,000 (20 franchises); and over $250,000 (15 franchises).

[5] Grimes, supra at 106, 123.

"evergreen" and reflects the expectation of franchisees that the relationship will be a continuing one. Termination or non-renewal is prohibited unless certain specified grounds are present under § 2802.[6] This protection reflects Congress' concern that terminations or short term contracts were being utilized by franchisors to implement coercive marketing practices. Slatky v. Amoco Oil Co., 830 F.2d 476 (3rd Cir. 1987) (en banc); H.R. Rep. No. 95-1661, at 14 (1977) and S. Rep. No. 95-731, at 17 (1978).

Congressional enactment of the PMPA recognized that petroleum retailers were subject to particularly powerful franchisor controls. Often the franchisee leases real property from the franchisor, the franchisor is the exclusive supplier of the trademark gasoline sold by the franchisee, and the franchisor controls the trademark or business identity under which the franchisee operates.[7] These three control mechanisms over the petroleum franchisee were all present in the relationship between Khan and State Oil.

The general franchising relationship was described recently by a commentator:

> In franchising the vertical relationship, often between a supplier and a retailer, is continuous and sometimes intense. The franchisee may gain the good will associated with the franchisor's trademark, standards for the quality and style of operation associated with the mark, and perhaps from training and advice provided by the franchisor. Still, the

[6] First time or "trial franchisees" under a one year agreement are treated separately under 15 U.S.C. § 2803. State law protections against termination or non-renewal are preempted by 15 U.S.C. § 2806(a).

[7] H.R. Rep. No. 95-1661, at 14, S. Rep. No. 95-731 at 17.

> capital and risk incentives for operation of individual outlets remain much like those of independently owned businesses. The franchisee risks its own capital to own and operate an outlet. But, unlike in an independently owned business, a franchisee generally relinquishes a great deal of control over the outlet and must share with the franchisor the revenue generated by the outlet. Many franchisees pay an up-front franchisee fee, continuing royalties based upon sales, and subject themselves to the franchisor's monitoring.

Grimes, supra, at 107.

The petroleum franchise relationship was described by the Eighth Circuit Court of Appeals in Roberts v. Amoco Oil Co., 740 F.2d 602, 604 (8th Cir. 1984):

> The petroleum marketing franchise relationship has a history of tension and problems. In 1971, a leading commentator in the area of franchise law observed:
>
> > In the Nation's second largest industry, the major oil firms have the gasoline station dealers in virtual bondage, hinged on the constant threat that their short-term contracts will not be renewed unless they submit to burdensome franchisor-imposed practices.. . . It is generally conceded that the gasoline station situation is almost hopeless and offers a prime example of the worst of abuses in franchising.

> Brown, Franchising-a Fiduciary Relationship, 49 Tex. L. Rev. 650, 655-657 (1971).
>
> The financial hardship imposed on franchisees by high minimum rent and "minimum gallonage" requirements, burdensome marketing requirements which benefit the franchisor but not the franchisee, and the ease of franchise termination have forced many franchisees out of business. See Comment, Retail Gasoline Franchise Terminations and Non-Renewals Under Title I of the Petroleum Marketing Practices Act, 1980 Duke L.J. 522, 524-525 (1980).

Id.. The disparity in power between supplier and dealer in the petroleum industry was recognized by this Court in Simpson, 377 U.S. 13, 20-21. See, also, Atlantic Refining Co. v. FTC, 381 U.S. 357, 368 (1965).

> Particularly in mature franchise industries, franchisors, if allowed by a "rule of reason" analysis to impose maximum resale prices while also determining the franchisee's cost of goods, will have a tremendous economic incentive to subject the franchisee to a price/cost squeeze. By lowering the resale price while raising the franchisee's cost of goods through the use of pre-existing exclusive dealing arrangements, the franchisors will be able to first usurp the franchisee's profit and eventually, through vertical integration, his investment.[8]

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[8] Continental T.V., Inc., eliminated the per se rule for non-price vertical restraints to avoid the "incentive for vertical integration into the distribution system, thereby eliminating . . . independent businessmen." Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. at 57, n.26 (1977). Elimination of the per se rule for vertical price restraints would perversely risk the same vertical integration, reflecting the wisdom of Continental T.V., Inc.'s observation that per se price restrictions involve a "significantly different . . . analysis and policy." Id. at 51, n.18.

Viewed from the franchisee perspective, the abandonment of the per se rule would allows suppliers, particularly those with exclusive supply contracts, to exploit the existing arrangements to transfer wealth.[9] Suppliers would have a strong financial motive to fix maximum prices,[10] and then raise supply costs so as to capture dealer margins and make likely the franchisees' business failure. While franchisees are desired and valued by franchisors for their initial franchise fees, capital investment and risk taking, particularly as a franchisor enters a new market, the attractiveness decreases after the franchisee has successfully entered and developed a market for the franchisor's product. As familiarity breeds attempt between the debutante and her suitor, success by the franchisee breeds attempt by the franchisor to secure the dealer's profits and investment for itself. If maximum price fixing is allowed, franchisors will be issued a license to go gunning for their most successful dealers in their most mature markets. The golden opportunity

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Furthermore, in Continental T.V., Inc., the franchisee had agreed to the non-price restraint at the time he became a franchisee. Here, the franchisees invested in their retail businesses under the belief that they could control their own prices and that it would be per se unlawful for their franchisor to interfere with that right. See also, Grimes, supra, at 126.

[9] Robert Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J., Sept. 1982, at 67.

[10] In Simpson v. Union Oil Co., this court noted "the critical importance of price control to money making by the large oligarchies of business." 377 U.S. at 22, n.9. Not surprisingly, the amici supporting the Petitioner do not include a jobber association of which State Oil is a class, because jobbers will be subjected to the same price controls by refiners if State Oil prevails, but amici supporting Petitioner do include large oligarchies of business from major segments of the economy.

to engage in a price/cost squeeze will prove too alluring for franchisors to resist.[11]

This case illustrates the anti-competitive market dislocations caused by vertical maximum price fixing. If the franchisor could not control the franchisee's resale price, it would have to face increased resale prices and declining demand for its products when it raised its wholesale price. The ability to effectuate the price squeeze, however, allows the franchisor to raise wholesale prices without suffering the retribution of a free market. Furthermore, pressure on the retailers profit margin may well force him to cease providing services which the customers demand and for which they are willing to pay. This was explicitly recognized as an anti-competitive consequence of maximum vertical price fixing by this Court in Atlantic Richfield Co. v. U.S.A. Petroleum Co., 495 U.S. 328, 335-36 (1990) ("Arco") and by the First Circuit Court of Appeals in Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 753 (1st Cir. 1994) (Breyer, J.).[12]

For virtually this entire century, and explicitly for the last half century (see, Kiefer-Steward Co. and Albrecht), this Court has repeatedly prohibited any interference with pricing decisions, whether maximum, minimum, vertical or

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[11] The importance of the dealer's effort in franchising is described in Andrea Shepard, Contractual form, retail price and asset characteristics in gasoline retailing, 24 Rand J. Economics, No. 1, Spring 1993, 58, 58-61.

[12] Both Arco and Caribe BMW also recognized that maximum vertical price fixing was anti-competitive in that it could lead to minimum vertical price fixing and could lead to concentration in the retail market by forcing all but a few very large (and likely vertically integrated) retailers from the market. Arco, 495 U.S. at 336, 110 S.Ct. at 1890; Caribe BMW, 19 F.3d at 753. Those holdings contrast sharply with the Seventh Circuit opinion below which, contrary to law and logic, states that antitrust injury can never result from vertical maximum price fixing. 93 F.3d at 1364.

horizontal, by independent business people.[13] During these decades of judicial adherence to the per se rule prohibiting all forms of price fixing, Congress by its "positive inaction" has allowed that absolute prohibition to stand and "has clearly evinced a desire not to disapprove of [it] legislatively." Flood v. Kuhn, 407 U.S. 258, 283-84 (1972). As a result, this Court should apply the doctrine of stare decisis, as it did in Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) and Flood v. Kuhn, and reaffirm its holding in Albrecht.

In Toolson this Court reconsidered its 1922 decision in Federal Baseball Club v. National League, 259 U.S. 200 (1922) where it decided that the business of baseball was neither trade nor commerce, and therefore, not subject to the antitrust laws. This Court held that in the thirty years since Federal Baseball was decided that the "business [of baseball] has thus been left . . . to develop, on the understanding that it was not subject to existing antitrust legislation" 346 U.S. at 357. This Court further noted Congress was aware of the Federal Baseball decision but did not reverse it legislatively. Because it would have been unfair to those who relied on the decision in Federal Baseball, this Court applied the doctrine of stare decisis, and declined to overrule its earlier, although

[13] While Continental T.V., Inc., 433 U.S. at 57 n.26 (1977) is often cited for the proposition that this court abandoned the "freedom of traders" rationale for the antitrust laws, that reading is incorrect. Justice White's concurring opinion feared that the Court was abandoning its longstanding and well-established concern for "the autonomy of independent businessmen," established in United States v. Colgate & Co., 250 U.S. 300, 307 (1919), Kiefer - Steward Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951), and Albrecht, 390 U.S. 145, 152 (1968). The majority opinion, while rejecting Ninth Circuit Judge Browning's dissent in Continental T.V., Inc., on the pure "social value" of the autonomy of independent businessmen, made clear it was not rejecting that standard when it impacts "price, quality, and quantity of goods and services." Continental T.V., Inc., 433 U.S. at 53, n.21. [emphasis added]

erroneous decision. Twenty years later, Flood v. Kuhn, pointed out that Toolson was based, in part, on a desire to avoid the "consequent retroactive effect" of overruling a precedent on which businessmen had relied and a preference, under those circumstances, that a prospective "remedy be provided by legislation rather than by court decree" 407 U.S. at 273-74.

Flood v. Kuhn held that baseball was clearly commerce and that Federal Baseball had "become an aberration" which was "unrealistic, inconsistent and illogical." 407 U.S. at 282. Nonetheless, this Court pointed out that "[Federal Baseball] is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis" Id. at 282. As a result, this Court again re-affirmed Federal Baseball, even though it believed - just as Judge Posner below believed of Albrecht[14]- that it was incorrectly decided. In doing so, this Court stated:

> If there is any inconsistency or illogic in all of this, it is an inconsistency and illogic of longstanding that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to Congressional intent made in Toolson and from the concerns as to retrospectivity therein expressed.

407 U.S. at 284.

In the current case, even if one believes Albrecht was incorrectly decided (which it was not), it should be reaffirmed

[14] In the decision below Judge Posner states "Albrecht was unsound when decided, and is inconsistent with later decisions by the Supreme Court." Khan v. State Oil Co., 93 F.3d 1358, 1363 (7th Cir. 1996).

on the basis of stare decisis. Even more so than in Flood or Toolson, independent businessmen/franchisees have relied for half a century on the explicit holdings of this Court that it constituted a per se offence for a supplier to vertically fix a dealer's maximum resale price. See Kiefer-Steward (1951) and Albrecht (1968).

Because they believed they could not be subjected to a cost/price squeeze by their franchisor, franchisees have invested hundreds of billions of dollars in sunk costs which they will not be able to recover if the rules are retroactively changed by the over ruling of Albrecht. Even if the Court believes Albrecht was incorrectly decided, it should defer to a prospective legislative solution just as it did for less compelling reasons in Toolson and Flood v. Kuhn. See also, Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved"); Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision and has not chosen to do so. We should accord weight to this continual acceptance of our earlier holding. Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision . . .").

II. THE REALITIES OF FRANCHISING MANDATE A PER SE RULE ON MAXIMUM RESALE PRICE MAINTENANCE

An examination of exclusive supply franchise arrangements provides ample support for continuation of the per se rule against maximum vertical price fixing. Suppliers

in exclusive arrangements, if given the ability to set the maximum prices charged by their retailers, will be given effective power to control the minimum price as well. Thus, while establishing the "maximum" price, State Oil was also the exclusive supplier of Khan, and was thereby able to establish his acquisition cost of goods. Unless Khan was to sell below his acquisition cost, his pricing decision range was 0-3% of his purchase price.[15] In 1992 and 1993, the industry wide gross margin per gallon was 11.2¢ and 12.8¢, meaning Khan had to price at the maximum allowable margin of 3.25¢ to be at 30% of the average retail gross profit per gallon.[16] The result is the precise danger warned of in Albrecht.

> Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all of the attributes of an arrangement fixing minimum prices.

Albrecht, 390 U.S. at 153 (footnote omitted). Compare Simpson, supra, 377 U.S. at 20-21, n.7. Thus, State Oil, in effect, was able to establish Khan's minimum, maximum and actual price.

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[15] Gasoline retail prices generally exceeded $1.00 per gallon during the relevant time period of 1992-3. Market Facts, 88 Nat'l Petroleum News, at 102 (1996).

[16] The Seventh Circuit noted that the receiver operating Khan's station, by disregarding the price ceiling with State Oil and realizing a margin on gasoline sales in excess of 3.25% per gallon, created the inference that if Khan had been able to raise his price above the suggested retail price, he would have had a higher income. Khan, 93 F.3d at 1365.

The experience in Khan v. State Oil demonstrates that if allowed to engage in maximum price fixing, suppliers will either intentionally run their franchisees out of business (and appropriate their capital) or will make erroneous pricing decisions due to a lack of market information. Specifically, Khan could not survive under the maximum pricing scheme imposed by State Oil which allowed Khan only a gross margin of 3.25 cents per gallon on each grade of gasoline. The receiver, however, with better information or less venal intent than the franchisor, was able to succeed by lowering the price on non-premium gasoline, and increasing the price and margin on premium gasoline, precisely the strategy Khan wished to employ. See, Petitioner's Brief, 7-8.

Another margin strategy often employed by gasoline stations is to offer a self-service price, a slightly higher mini-service price and a still higher full-service price. In each instance, the higher price reflects the level of service being provided. Indeed, to attract more customers, dealers often offer car washes or other services at reduced or no cost depending on the mode and quantity of gasoline purchased. Although consumers clearly demand and are willing to pay for these services by paying a slightly higher per gallon price, those services will no longer be available to consumers if the suppliers can impose maximum vertical prices and force down the retail price. See, Continental T.V., Inc., 433 U.S. 36, 55 ("Service and repair are vital for many products . . .).

The result is that the retailer is unable to react to his local market with a mix of competitive prices and services. Again, Albrecht is instructive:

> But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of the seller for the forces of the competitive market, may severally intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value of which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay.

390 U.S. at 152-153. See also, Caribe BMW, 19 F.3d at 753 (maximum resale price fixing might prevent dealers from offering services which consumers demand).

Economic theory explains this anticompetitive result by observing that when pricing decisions are made by the supplier, who is more removed and isolated from the market forces, and has less information on the particular market and location, the supplier is unable to respond as quickly or as accurately to the market and establish a competitive price.

Maximum retail price fixing also insulates the wholesaler from the market consequences of erroneous wholesale pricing. Because the retailer is prevented from raising retail prices in response to an erroneous wholesale price increases, the supplier is insulated from a predictable drop in the demand for its product as a result of its wholesale pricing mistake. The market forces at the wholesale level are therefore distorted and erroneous prices and a misallocation of resources result at both the wholesale and retail level.[17]

In this context, the observation of this Court in Continental T.V., Inc. v. G.T.E. Sylvania, Inc. is particularly instructive:

[17] Grimes, supra, at 153.

> The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . . There are, however, significant differences that could easily justify different treatment. . . . [U]nlike non-price restrictions, '[r]esale price maintenance is not only designed to, but almost in variably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands.' 372 U.S., at 268. Professor Posner also recognized that 'industry-wide resale price maintenance might facilitate cartelizing.'

Id., 433 U.S. at 51, n.18 [citations omitted]

Ultimately the criticisms of Albrecht all return to a single source: the competitive benefit of having a supplier control the retail prices of a monopoly dealer.[18] The only real world example of this, however, is Albrecht itself, where a distributor had an exclusive territory in which to distribute a monopoly product. As infrequently as that scenario obtained in 1967, there is even less reason to fear monopoly power by a retailer today.[19] In the post-industrial economy and the information age, retailers with exclusive territories and monopoly power are virtually non-existent. Local merchants were long ago challenged by discount chains, who were in turn challenged by regional malls, specialty discount marketers [i.e. the "big box" stores], mail order catalogs, cable television marketers, and most recently Internet sales. As for petroleum retailing, it would be anomalous to find that a retailer had even a scintilla of monopoly or market power.

[18] Mark E. Roszkowski, Vertical Maximum Price Fixing: In Defense of Albrecht, 23 Loy. U. Chi. L.J. 209, 222 (1992).

[19] Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 727 n.2 (1988).

The argument advanced by amici supporting Petitioner, that suppliers need to set maximum prices in order to have uniform promotional prices is also without merit. If the promotional price makes economic sense, the supplier should be able to persuade retailers to use that promotional price. See, Moro v. Shell Oil Co., 91 F.3d 872 (7th Cir. 1996); Winn v. Edna Hibel Corp., 858 F.2d 1517 (11th Cir. 1988); and Hanson v. Shell Oil Co., 541 F.2d 1352, 1357 n.4 (9th Cir. 1976), cert. denied, 429 U.S. 1074 (1977). In any event, unless this Court is willing to discard the per se rule against minimum retail price maintenance, setting maximum prices will not assure uniformity in promotional prices unless the maximum price effectively becomes the minimum price. Albrecht, 390 U.S. at 152.

CONCLUSION

For 50 years Keifer-Steward and Albrecht established and upheld the per se rule prohibiting vertical maximum price fixing. Price fixing is at the core of the antitrust laws. The ability to establish a competitive price is both the essence of independent business judgment as well as critical to the freedom of traders. Sound economic arguments support the per se rule against vertical price fixing.[20]

Dealers and franchisees, like Khan and the Amici herein, have invested billions of dollars in their franchises, sunk costs that cannot be easily extracted. Those investments were made in reliance upon this Court's decision in Albrecht that traders

[20] Roszkowski, supra, at 223-239.

would remain free to establish the mix of prices and services that would allow them to operate competitively and profitably in the market. This Court must not knock the props out from under these retailers, for the result will surely be franchisor encroachment on their profits and ultimately their investments through vertical maximum price fixing. Franchisees must remain free to establish their own prices or they will lose their investments and their livelihoods.

In light of Congressional inaction, as well as investments made by dealers and franchisees in reliance on this Court's longstanding and clearly expressed doctrine, this Court should adhere to stare decisis and affirm the per se prohibition against vertical maximum price fixing announced in Albrecht.

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